IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

CASE NO.: 01-2017-CA-002426

US RIGHT TO KNOW,

Plaintiff,

vs.

THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S COMPLAINT FOR WRIT OF MANDAMUS AND ORDER TO SHOW CAUSE

Defendant, The University of Florida Board of Trustees ("UF"), hereby responds to Plaintiff US Right to Know's Complaint seeking a writ of mandamus and to this Court's July 13, 2017 Order to Show Cause Why Complaint for Writ of Mandamus Should Not be Granted:

I. INTRODUCTION

A. AgBioChatter Yahoo Group Public Records Request

1. The Request

By letter dated September 3, 2015, Gary Ruskin requested that UF provide "all email to or from Professor Folta that is to, from, CC or BCC to the email address [for] AgBioChatter . . . from July 1, 2012 to the present."[1] Compl. ¶ 3; Compl. Ex. A. To fulfill the request, UF Information Technology Department ("UF IT") performed an electronic search of Dr. Folta's e-mails and provided 5,343 pages of potentially responsive documents to the Office of General Counsel for review. UF then sent Mr. Ruskin an invoice for $1,233.88 for review, redaction and production of these e-mails. Compl. ¶ 4.

However, following a review of the e-mails, UF's Office of General Counsel determined that most of these documents were not in fact public records. On or around March 7, 2016, UF provided a response to the September 3, 2015 request, which included 24 pages of e-mail records. Compl. ¶ 5. On or around June 17, 2016, UF provided an additional response, which included 57 pages of e-mail

[1] This request was one of at least ten public records requests sent by Mr. Ruskin to UF in 2015-2016. In response to these ten public records requests, UF has provided Mr. Ruskin over 13,900 pages of records.

records. Additionally, UF refunded Mr. Ruskin the invoiced $1,233.88. Compl. ¶ 6.

2. Dr. Kevin Folta

Dr. Kevin Folta first joined the UF faculty in November 2002 as an assistant professor in the Horticultural Sciences Department. He is currently a professor and chairman of the Horticultural Sciences Department. Dr. Folta runs a laboratory at UF, which researches, *inter alia*, light signaling on plants, strawberry genomics, and transgenic technologies in berries.

3. AgBioChatter Yahoo Group

Started around a decade ago by scientists with a similar and controversial position on agricultural biotechnology, AgBioChatter is a private online discussion board (the "Yahoo Group"), through the internet services provider Yahoo!, which is headquartered in Sunnyvale, California. This Yahoo Group allows members to send group messages to the AgBioChatter e-mail address, or to post on the group's website, and that same message will automatically be sent to all participating members' e-mail addresses. Additionally, participants may read these messages on the group's Yahoo website, which is accessible to members only.

The AgBioChatter Yahoo Group is a private forum for invited members only. Members of this group include professors, scientists, as well as other parties, with similar interests and stances on agricultural biotechnology. The AgBioChatter Yahoo Group provides a forum for members to have discussions about their positions on agricultural biotechnology, which is currently a debated, and often controversial, issue without fear that their personal beliefs will be disclosed to others.

B. University of Florida Foundation Public Records Request

1. The Request

By letter dated October 27, 2015, Mr. Ruskin requested, *inter alia*, "all email correspondence between Mr. [*sic*] Payne and any staff or employees of the University of Florida Foundation that includes any of the following keywords: [13 bulleted keywords or phrases provided] . . . from January 1, 2013 to the present." Compl. ¶ 12; Compl. Ex. C. To fulfill this specific request, UF IT performed an electronic search of Dr. Payne's e-mails, and provided 169 pages of potentially responsive documents to the Office of General Counsel for review.[2] Following review of these documents, the Office of General Counsel determined that the majority were

[2] UF initially asserted that all the requested e-mails were confidential and exempt, pursuant to section 1004.28, Florida Statutes. However, in an abundance of caution, UF agreed to review and produce e-mails that could possibly be considered public records without an exemption.

confidential and exempt records, pursuant to section 1004.28(5)(b), Florida Statutes.[3] On or about December 15, 2015, UF provided 5 pages of e-mail documents in response to Mr. Ruskin's specific request noted above. Compl. ¶ 14.

2. Dr. Jack Payne

Dr. Jack Payne began his employment with UF in 2010 following a Vice President position at Iowa State University. Dr. Payne is the Senior Vice President for Agriculture and Natural Resources and the administrative head for the Institute of Food and Agricultural Sciences ("UF/IFAS"). UF/IFAS is a federal-state-county partnership that includes extension offices in each of Florida's 67 counties. UF/IFAS provides research and development for Florida's agricultural, natural resources, and related food industries.

3. University of Florida Foundation

As authorized under section 1004.28, Florida Statutes, the University of Florida Foundation, Inc. ("UFF") is a Florida not-for-profit corporation, incorporated under the provisions of Chapter 617, Florida Statutes. UFF is a direct-

[3] Section 1004.28(5)(b), Florida Statutes, exempts and makes confidential "[a]ll records of the [direct-support] organization other than the auditor's report, management letter, and any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability."

support organization and the primary fundraising arm of UF. Its mission is to "exclusively support and enhance the University of Florida . . . by creating awareness, building relationships, securing private support, recognizing donors, and performing all business-related matters to accomplish these purposes."[4] Further, according to UFF's Bylaws at article 10, section 4,

> [a]ll fundraising activities undertaken by University employees or students, or by volunteers, are undertaken on behalf of the Foundation. All documents associated with such activities or with advising or serving the Foundation, whether or not in possession of any University employee or student, or any volunteer, are records of the Foundation and are confidential.[5]

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[4] Art. 1, Bylaws of the University of Florida Foundation, Inc. (Mar. 4, 2016), *available at* https://www.uff.ufl.edu/Documents/Document.asp?DocID=276.

[5] Art. 10, § 4, Bylaws of the University of Florida Foundation, Inc., (Mar. 4, 2016), *available at* https://www.uff.ufl.edu/Documents/Document.asp?DocID=276; *see also* UFF Policy #1.03, *Confidentiality of Foundation Records* (Sept. 8, 2007), *available at* https://www.uff.ufl.edu/Documents/Document.asp?DocID=1980 ("All documents associated with such activities in possession of any University staff, faculty, or student, or any volunteer, are records of the Foundation and are confidential.") .

II. LEGAL AUTHORITY AND ARGUMENT

A. The AgBioChatter Yahoo Group Communications are not Public Records as defined in Chapter 119.

Article I, section 24(a), Florida Constitution, grants a right of access to "any public record made or received *in connection with the official business of any public body, officer, or employee of the state*, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." (Emphasis added). The Florida Legislature defines public records as "all documents . . . or other material, regardless of the physical form, characteristics, or means of transmission, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency*."[6] § 119.011(12), Fla. Stat. (2016) (emphasis added). Notably, "[t]he physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper." *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013) (per curiam).

[6] Section 119.011(2), Florida Statutes, defines "agency" to include "any state . . . or other separate unit of government created or established by law . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

Consequently, a document – electronic or otherwise - rises to the level of a public record only if it is made or received (1) pursuant to law or ordinance or (2) in connection with the transaction of official business of the state. *See State v. City of Clearwater*, 863 So. 2d 149, 152 (Fla. 2003) ("Thus, both article I, section 24 and chapter 119 specify that public records are those records that are in some way connected to 'official business.'"). The Florida Supreme Court has further construed this definition to encompass all materials made or received by an agency in connection with official business "which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

In *City of Clearwater*, the Florida Supreme Court clarified that the personal e-mails of two City employees were not public records, as "it cannot merely be the placement of the e-mails on the [public agency's] computer system that makes the e-mails public records." 863 So. 2d at 154. "Rather, the e-mails must have been prepared 'in connection with official agency business' and be 'intended to perpetuate, communicate, or formalize knowledge of some type.'" *Id.* (quoting *Shevin*, 379 So. 2d at 640). Because these e-mails were not public records, they were not subject to disclosure pursuant to Chapter 119 despite their placement on the City's computer system. *Id*. at 155.

Similarly, the Fourth District found that a personal e-mail sent by the City of Hallandale Beach's Mayor to her friends and supporters, which attached news articles she wrote, was not a public record. *Butler v. City of Hallandale Beach*, 68 So. 3d 278 (Fla. 4th DCA 2011). The district court determined that the City played no role in the Mayor's decisions concerning the news articles or the e-mail. *Id*. at 281. Thus, the determining factor as to whether the e-mail was a public record was "whether [it] was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind." *Id*. at 280-81 (citing *City of Clearwater*, 863 So. 2d at 154).

To that end, not every document that passes through the walls of UF and not every e-mail that hits the inbox of a UF employee is a public record. *See City of Clearwater*, 863 So. 2d at 154 ("This court noted several times during hearings on this case the absurd consequences of such an application of the law . . . [such as] [i]f a Senator writes a note to herself while speaking with her husband on the phone does it become public record because she used a state note pad and pen?" (quoting *Times Publ'g Co. v. City of Clearwater*, No. 00-8232-CI-13, at 10 (Fla. 6th Cir. Ct. order filed May 21, 2001))); *see also Bent v. State*, 46 So. 3d 1047, 1050 (Fla. 4th DCA 2010) (per curiam) ("The Florida Supreme Court has repeatedly rejected the notion that almost everything generated or received by a public agency is a public

record" (internal quotation marks omitted)); *Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3, 5-6 (Fla. 1st DCA 2003) (records of personal cell phone calls of legislative staff do not constitute official business of the Legislature and are not subject to public disclosure). Quite the contrary, an e-mail is considered a public record:

> If the public agency or official receives an e-mail and it is intended by that agency or official that the e-mail be acted upon by the agency or that its contents be perpetuated, communicated or formalized as knowledge with the agency . . . . Otherwise the e-mail is not a public record.

Order on Evidentiary Hearing at 6, *Grapski v. Machen*, No. 01-2005-CA-4005 (Fla. 8th Cir. Ct. May 9, 2006), *aff'd per curiam*, 949 So. 2d 202 (Fla. 1st DCA 2007).

Further, "[t]he determination of what constitutes a public record is a question of law." *City of Clearwater*, 863 So. 2d at 151 (quoting *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 840 So. 2d 1008, 1013 (Fla. 2003)).

Here, a UF employee personally and independently joined a private Yahoo Group in hopes of connecting with likeminded individuals in the field of agricultural biotechnology. Joining this Yahoo Group is not part of Dr. Folta's assigned duties nor is it within the scope of his work for UF. He does not receive any

compensation or remuneration from UF for his participation in AgBioChatter. Moreover, UF neither sanctions nor controls Dr. Folta's correspondence with this group – and has no fiscal relationship with AgBioChatter. Dr. Folta participates because the group has similar interests and personal views on agricultural biotechnology.[7] The e-mails posted to the Yahoo Group reflect AgBioChatter participants', from a vast array of locations and backgrounds, personal opinions and views.

Dr. Folta's communication and participation with the AgBioChatter Yahoo Group was neither consistent nor substantial. In fact, Dr. Folta did not open most of the e-mails from this AgBioChatter Yahoo Group. Rather, these e-mails sat on the UF network as received, but unopened, which further illustrates that these e-mails were not prepared in connection with official UF business and were not intended to perpetuate, communicate, and formalize knowledge of any kind. *See* Order on Evidentiary Hearing at 6, *Grapski v. Machen*, No. 01-2005-CA-4005 (Fla. 8th Cir. Ct. May 9, 2006) ("In this modern computer age with the ability of people to continually send e-mails to public officials and the problems all persons who own a computer face with 'spam' and bulk mail, to hold that every e-mail a public official

[7] In an abundance of caution and as a sign of good faith, UF reviewed all e-mails sent by Dr. Folta to the AgBioChatter Yahoo Group. UF produced e-mail records wherein Dr. Folta could have been discussing the official business of UF, although he likely was not.

receives on his or her public computer mentioning the agency, is a public record is an absurd result.").

In *Becker v. University of Central Florida Board of Trustees*, No. 2013-CA-5265-O, 2014 WL 1499515 (Fla. 9th Cir. Ct. April 17, 2014) (copy of Final Order attached as **Exhibit A**), *aff'd per curiam*, 181 So. 3d 504 (Fla. 5th DCA 2015), the ninth circuit grappled with a comparable issue. In that case, self-described journalist and activist John Becker requested e-mail records of a University of Central Florida professor concerning a certain article published in the Social Science Research Journal (the "SSR Journal"). *Id*. at 2. Said professor was a co-editor of the SSR Journal, on a personal service contract with its owner and publisher, Elsevier, Inc. *Id*. To analyze whether the requested e-mails were public records, the court applied the "totality of factors" test endorsed by the Florida Supreme Court in *News & Sun-Sentinel Co. v. Schwab Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). *Id*. at 7. In *Schwab*, the Court delineated a nine factor test to determine if a private entity's records fell under Chapter 119's obligations. 596 So. 2d at 1031. In addition to these nine factors, the ninth circuit also considered public policy. Running the instant case briefly through the "totality of factors" test clearly shows that the AgBioChatter Yahoo Group's communications land on the side of private documents, as follows:

1. *The level of public funding*. UF does not provide any funds to AgBioChatter. Dr. Folta's participation is his personal and independent endeavor.

2. *Commingling of funds*. UF is not involved in payments, if any, from or to Dr. Folta for his participation in AgBioChatter. UF does not provide any funds to AgBioChatter, and AgBioChatter does not provide any funds to UF.

3. *Whether the activity was conducted on publicly owned property*. While Dr. Folta did send and receive e-mails with his UFL e-mail address, and sometimes from a UF-issued computer (similar to the professor in *Becker*), the majority of e-mail posts were composed and sent from other sources. Neither UF networks nor UF equipment are used to manage or host the AgBioChatter Yahoo Group website. The AgBioChatter Yahoo Group is not moderated or monitored by Dr. Folta or any other UF employee; in fact, he did not even open the majority of the e-mails he received from the group.

4. *Whether services contracted for are an integral part of the public agency's chosen decision-making process*. UF has no interaction with, has no contract with, has no obligation to provide money or resources to, has no ownership interest in, and has no control of the content discussed by the AgBioChatter Yahoo Group. If Dr. Folta chose to immediately disband his participation with this group, his position at UF would in no way be impacted.

5. *Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform*. UF has not delegated any governmental function to AgBioChatter and has not permitted AgBioChatter to participate in any way in its decision-making process. AgBioChatter is not performing a function of this land-grant university.

> 6. *The extent of the public agency's involvement with, regulation of, or control over the private entity*. UF has no power or control over the actions, content, discussions or association of AgBioChatter.
>
> 7. *Whether the private entity was created by the public agency*. UF did not participate in the creation or establishment of AgBioChatter.
>
> 8. *Whether the public agency has a substantial financial interest in the private entity*. UF has no financial interest in AgBioChatter and does no receive any remuneration from AgBioChatter.
>
> 9. *For whose benefit the private entity is functioning*. AgBioChatter is not operating for UF's benefit; conversely, its purpose is to provide a private forum for individuals to discuss their personal ideas on agricultural biotechnology.
>
> 10. *Public policy*. The decision of this case could significantly impact UF. Many of UF's professors are members of personal e-mail groups. If such groups' documents, which are not associated with UF, but are merely a forum for academics to discuss their personal interests, constituted public records, then housing the large amount of e-mails would be difficult for UF IT. Further, a professor's views on a politically-charged issue, and his or her ability to seek information from others, would be significantly impacted. Simply by agreeing to work for a public institution, a professor does not give up his or her right to associate with other likeminded individuals or to discuss personal opinions and personal activism with others.

Rather, Dr. Folta's participation in AgBioChatter is similar to a city attorney joining, and receiving e-mail from, the Women Lawyers Association of her local bar.

Her participation is not sanctioned by the city, and e-mail correspondence does not perpetuate, communicate or formalize knowledge in connection with official city business. Rather, the attorney's participation in the group aligns with her personal interests and profession, and is not a "public record."

B. UF properly withheld Dr. Payne's e-mails pursuant to Section 1004.28, Florida Statutes.

Pursuant to section 1004.28(5)(b), Florida Statutes, "[a]ll records of the [direct-support] organization other than the auditor's report, management letter, and any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability *shall be confidential and exempt from s. 119.07(1)*." (Emphasis added).

UF has a duty to withhold confidential information from the public, pursuant to section 1004.28(5)(b), Florida Statutes. Simply stated, "[s]ection 1004.28(5) exempts all documents that are created by a DSO except for listed exceptions." *Environmental Turf, Inc. v. University of Florida Bd. of Trs.*, 83 So. 3d 1012, 1013 (Fla. 1st DCA 2012). The listed exceptions to section 1004.28(5)(b) are as follows: (1) auditor's report, (2) management letter, and (3) any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor

General, and the Office of Program Policy Analysis and Government Accountability. The documents in this case were created by the UFF and do not fall into any of the listed exceptions. Moreover, many of the records at issue contain financial information and lists of contributions to UFF, which, if disclosed, could have long term adverse effects on the DSO. Therefore, UF fulfilled its obligations by collecting and reviewing the documents, withholding confidential and exempt documents, and releasing the rest of the documents to Mr. Ruskin.

C. A writ of mandamus is not proper in this case.

"In order to be entitled to a writ of mandamus the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Putnam Cty. Envtl. Council v. St. Johns River Water Mgmt. Dist.*, 168 So. 3d 296, 298 (Fla. 1st DCA 2015) (per curiam) (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)). "The legal duty must be ministerial and not discretionary." *Polley v. Gardner*, 98 So. 3d 648, 649 (Fla. 1st DCA 2012). In the case at hand, the question becomes whether UF should be compelled to perform a ministerial duty, or "a duty or act . . . [where] no room exists for the exercise of discretion and the law directs the required performance," *Rhea*, 109 So. 3d at 855, in connection with Mr. Ruskin's public records requests.

UF has attempted to comply with Chapter 119 in good faith by providing Mr. Ruskin with all the records that are public records and not subject to a legislatively-declared exemption. Mr. Ruskin does not have a clear legal right to demand UF to release either non-public records or confidential public records. Mr. Ruskin is not entitled to private documents that happen to find their way onto UF property, *see City of Clearwater*, 863 So. 2d at 154, and Plaintiff does not make these e-mails public merely by making such a legal conclusion in its pleading.

Similarly, UF does not have a legal duty to release records that are not public records or that are records made confidential by the Florida Legislature. UF's duty to fulfill public records requests is simply not limited to copying and blindly providing any record requested. UF must ensure that records, or sections of records, that are confidential are not provided to the public.[8] UF is also permitted to

[8] Records of a public postsecondary educational institution contain a variety of exemptions, including student education records, *see* § 1006.52(1), Fla. Stat. (2016) ("A student's education records, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g, and the federal regulations issued pursuant thereto, and applicant records are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."); social security numbers, *see* § 119.071(5)(a)5., Fla. Stat. (2016) ("Social security numbers held by an agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."); and medical information, *see* § 119.071(4)(b)1., Fla. Stat. (2016) ("Medical information pertaining to a prospective, current, or former officer or employee of an agency which, if disclosed, would identify that officer or employee is exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution.").

review records for any additional public records exemptions. Therefore, UF has fulfilled all its ministerial duties under Chapter 119 to Mr. Ruskin, and the writ should not be granted.

To determine whether the UFF records were properly withheld, UF would not object to providing the records for an in camera inspection by this Court. *See Environmental Turf, Inc.*, 83 So. 3d at 1013 ("[A]n in-camera inspection is 'generally the only way for a trial court to determine whether or not a claim of exemption applies.'" (quoting *Garrison v. Bailey*, 4 So. 3d 683, 684 (Fla. 1st DCA 2009)).

III. DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant responds to the Complaint for Writ of Mandamus and states:

FACTS ON WHICH PLAINTIFF RELIES FOR RELIEF

1. Defendant is without knowledge of the allegations contained in paragraph 1 of the Complaint and therefore denies those allegations.

2. Defendant admits the allegations contained in paragraph 2 of the Complaint.

The AgBioChatter Emails

3. Defendant admits that on or about September 3, 2015, Plaintiff made a request for documents to Defendant, which speaks for itself, and otherwise denies the allegations contained in paragraph 3 of the Complaint.

4. Defendant admits that based on the anticipated volume of records to be examined, it requested an initial payment of $1,233.88 to process the request, and following receipt of such sum from Plaintiff, Defendant realized the documents which had to be processed and produced under the applicable statutes did not require such payment and returned such sum to Plaintiff, and otherwise denies the allegations contained in paragraph 4 of the Complaint.

5. Defendant admits that on or about March 7, 2016, it provided to Plaintiff some 24 pages of records in response to Plaintiff's request and denies that the records produced did not include e-mails "received" by Dr. Folta. For example, page 2 of Exhibit B contains a post to the AgBioChatter Yahoo Group by a participant to which Dr. Folta responded, as does page 3 of Exhibit B. Defendant denies the remaining allegations in paragraph 5 of the Complaint.

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits that on or about June 17, 2016, it produced an additional 57 pages of documents pursuant to Plaintiff's request and denies the remaining allegations contained in paragraph 7 of the Complaint.

8. Defendant denies the allegations contained in paragraph 8 of the Complaint.

9. The allegations contained in paragraph 9 misstate the applicable Florida law and therefore are denied.

10. Defendant denies the allegations contained in paragraph 10 of the Complaint.

11. Defendant admits that on or about June 16, 2017, Plaintiff made an additional request to Defendant, which request speaks for itself, and otherwise is without knowledge of, and therefore denies, the remaining allegations contained in paragraph 11 of the Complaint.

The Payne Emails

12. Defendant admits that on or about October 27, 2015, Plaintiff made a request for documents to Defendant, which request speaks for itself, and otherwise denies the allegations contained in paragraph 12 of the Complaint.

13. The documents referred to were produced in response to Exhibit C, not paragraph 11 as stated. Accordingly, Defendant denies the allegations contained in paragraph 13 of the Complaint.

14. There is no paragraph 11(b) in the Complaint. Defendant denies the allegations contained in paragraph 14 of the Complaint.

15. Defendant states that the provisions of the Florida Statutes speak for themselves and otherwise denies the allegations contained in paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in paragraph 16 of the Complaint and states that whether or not Dr. Payne is an employee of the University of Florida Foundation is irrelevant to a determination under Chapter 119 (*Environmental Turf*), and otherwise denies the allegations contained in paragraph 16.

17. The provisions of Chapter 119 speak for themselves, and Defendant otherwise denies the allegations contained in paragraph 17 of the Complaint.

18. Defendant denies the allegations contained in paragraph 18 of the Complaint.

COUNT FOR WRIT OF MANDAMUS

19. Defendant reasserts and re-alleges the responses to paragraphs 1 through 18 of the Complaint.

20. Defendant denies the allegations contained in paragraph 20 of the Complaint.

21. Defendant denies the allegations contained in paragraph 21 of the Complaint.

22. Defendant denies the allegations contained in paragraph 22 of the Complaint.

23. Defendant denies the allegations contained in paragraph 23 of the Complaint.

ARGUMENT

24. The Florida Legislature defines public records as "all documents . . . or other material, regardless of the physical form, characteristics, or means of transmission, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency*." § 119.011(12), Fla. Stat. (2016) (emphasis added). The Florida Supreme Court has further construed this definition

to encompass all materials made or received by an agency in connection with official business "which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980). Clearly, not every document received or generated by a public agency is a public record. *See Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st DCA 2003); *see also Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010) ("The Florida Supreme Court has repeatedly rejected the notion that almost everything generated or received by a public agency is a public record." (internal quotation marks omitted)). Thus, an e-mail is not deemed a public record unless it is made "'in connection with official agency business' and [is] 'intended to perpetuate, communicate, or formalize knowledge of some type.'" *City of Clearwater*, 863 So. 2d at 154 (citing *Shevin*, 379 So. 2d at 640).

25. Plaintiff has a right to access UF's public records, but does not have a right to access private e-mails of UF employees or records that the Legislature has exempted from Chapter 119.

26. Section 1004.28(5)(b), Florida Statutes, clearly and unequivocally states that "[a]ll records of the [direct-support] organization other than the auditor's report, management letter, and any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of

Program Policy Analysis and Government Accountability shall be confidential and exempt from s. 119.07(1)." The First District has confirmed that "[s]ection 1004.28(5) exempts all documents that are created by a DSO except for listed exceptions." *Environmental Turf, Inc.*, 83 So. 3d at 1013. The UFF e-mails requested by Mr. Ruskin undoubtedly fall within the confines of the legislatively-exempted records, and he is therefore not entitled to receive the same.

27. In accordance with Chapter 119, Florida Statutes, UF has fully and in good faith gathered, reviewed, and released public records pursuant to Mr. Ruskin's September 3, 2015 and October 27, 2015 public records requests. Unfortunately, Mr. Ruskin requested some documents that are either not public records or are confidential. Therefore, a writ of mandamus is not appropriate in this circumstance as UF has fulfilled its ministerial duties.

28. The e-mails exchanged by the AgBioChatter Yahoo Group, are not public records. *See City of Clearwater*, 863 So. 2d at 154 (private e-mails are not considered public records merely because they reside on a public agency's computer). His participation in the group was due to his personal interests and stance on agricultural biotechnology. The e-mail posts were not received in connection with UF's official business, and the records of AgBioChatter do not fall under the purview of Chapter 119, Florida Statutes. *See* Final Order, *Becker v. Univ. of Cent.*

Florida Bd. of Trs., No. 2013-CA-5265-O, 2014 WL 1499515 (Fla. 9th Cir. Ct. April 17, 2014) (applying a "totality of factors" test to determine if a UCF professor's e-mails were public records), *aff'd per curiam*, 181 So. 3d 504 (Fla. 5th DCA 2015). Because these records are personal e-mails and because AgBioChatter is a private entity without a Chapter 119 obligation, UF does not have a ministerial duty to produce them to Mr. Ruskin.

29. UF re-alleges and incorporates its response from paragraph 26.

30. UF would not object to submitting the UFF records, under seal, for an in camera inspection by this Court.

31. In accordance with Chapter 119, Florida Statutes, UF has fully and in good faith gathered, reviewed, and released public records pursuant to Mr. Ruskin's September 3, 2015 and October 27, 2015 public records requests. Unfortunately, Mr. Ruskin requested some documents that are not public records and some documents that are confidential. Therefore, a writ of mandamus is not appropriate in this circumstance, as UF has fulfilled its ministerial duties.

32. Plaintiff is not entitled to attorneys' fees in this case. Section 119.12, Florida Statutes (2016), states:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency *unlawfully refused to permit a public record to be inspected or copied*, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

(Emphasis added). UF has not unlawfully refused to copy or disclose public records.

> [A]ttorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.

Office of the State Attorney for the Thirteenth Judicial Circuit of Fla. v. Gonzalez, 953 So. 2d 759, 764 (Fla. 2d DCA 2007) (per curiam). Neither circumstance is present in the matter at hand. Rather, UF has responded in good faith to Mr. Ruskin's requests, in accordance with Chapter 119.

24-32. Defendant denies specific allegations raised in paragraphs 24 through 32 contained in the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Defendant, The University of Florida Board of Trustees, has fully and in good faith responded to all public records requests made by Plaintiff completely and in accordance with Chapter 119, Florida Statutes.

Second Affirmative Defense

The documents requested either have been produced, do not exist within the knowledge of Defendant, or were withheld as exempt pursuant to section 1004.28(5) or section 119.011(12), Florida Statutes, and therefore there can be no violation of Chapter 119, Florida Statutes.

Third Affirmative Defense

The Complaint fails to state a claim upon which relief can be granted and inasmuch as there is no factual basis contained within the Complaint to support a claim under Chapter 119, Florida Statutes.

Fourth Affirmative Defense

The Complaint fails to state a claim for issuance of writ of mandamus as issuance would be futile because Defendant has produced to Plaintiff all documents subject to the Public Records Act.

WHEREFORE, Defendant, The University of Florida Board of Trustees, respectfully requests that this Court discharge the alternative writ, dismiss this action, deny Plaintiff's request for attorneys' fees and other relief, and grant Defendant relief as the Court deems appropriate including its costs.

Respectfully submitted,

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

By: s/John A. DeVault, III
John A. DeVault, III
Florida Bar No. 0103979
Primary E-mail: jad@bedellfirm.com
Secondary E-mail: mam@bedellfirm.com
Courtney A. Williams
Florida Bar No. 68119
Primary E-mail: caw@bedellfirm.com
Secondary E-mail: mam@bedellfirm.com
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307

Attorneys for Defendant The University of Florida Board of Trustees

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing to the following:

Lynn C. Hearn
lhearn@meyerbrookslaw.com

Ronald G. Meyer
rmeyer@meyerbrookslaw.com

Joseph E. Sandler
sandler@sandlerreiff.com

s/John A. DeVault, III
Attorney

EXHIBIT A

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

JOHN M. BECKER,

CASE NO.: 2013-CA-5265-O

Petitioner,

v.

THE UNIVERISTY OF CENTRAL
FLORIDA BOARD OF TRUSTEES,

Respondent.

and

ELSEVIER, INC.,

Intervener.
_____/

FINAL ORDER GRANTING "UCF'S MOTION FOR RECONSIDERATION AND VACATUR OF PRIOR JUDGE'S ORDERS OF NOVEMBER 7 AND 13, 2013, AND ALTERNATIVE MOTION FOR FINAL ORDER IN FAVOR OF UCF"

THIS MATTER came before the Court upon the Fifth District Court of Appeal's Order to determine whether the trial court's[1] November 13, 2013 "Order on UCF Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013" was intended to be a final order. The Fifth District also relinquished jurisdiction to this Court to enter a final order and hold further proceedings if necessary. The Court, after considering the memoranda filed by all parties, relevant case law, the testimony and evidence presented at the evidentiary hearing on April 9-11, 2014, along with arguments from counsel, finds as follows:

[1] Judge Donald E. Grincewicz entered the Order in question on November 13, 2013; on November 15, 2013, Judge Grincewicz *sua sponte* recused himself, and this matter was reassigned to the undersigned judge.

FACTS AND PROCEDURAL HISTORY

Petitioner John M. Becker ("Becker") is a self-described investigative journalist and activist in the area of lesbian, gay, bisexual, and transgender rights. Becker submitted to the University of Central Florida ("UCF") a public records request for e-mails on UCF's computer servers relating to the publication of an article in the Social Science Research Journal ("SSR Journal" or "Journal").

The SSR Journal is owned and published by the private, for-profit company, Elsevier, Inc. ("Elsevier"), which publishes approximately 2,200 journals and 25,000 book titles. The majority of the SSR Journal's business is done via cyberspace on Elsevier's servers located in Dayton, Ohio, and the physical location of most of the Journal's activities is in Chennai, India. The SSR Journal is not an independent entity in and of itself, and is instead, a privately-owned product.

Elsevier entered into personal service contracts with Dr. James Wright, wherein he would provide editorial services on the SSR Journal in exchange for direct personal compensation from Elsevier. Dr. Wright and Dr. Donley are both current faculty members with UCF's Department of Sociology.

By way of background, the SSR Journal was created in 1972 at Johns Hopkins University and was housed there until 1974.[2] In 1974, the Journal's founder joined the faculty of the University of Massachusetts and brought the Journal there. While housed at University of Massachusetts, the Journal used a university e-mail address, and Dr. Wright eventually became its co-editor. In 1988, Dr. Wright left the University of Massachusetts to join the faculty of Tulane University. He brought the Journal there with him, and it began utilizing a Tulane e-mail address. In 2001, Dr. Wright left Tulane and joined the faculty of UCF, and the Journal followed

[2] In this context, the term "housed" refers to the journal editor's current place of employment.

him to UCF and began utilizing a UCF e-mail address. At present, the Journal no longer uses a UCF e-mail address.

Elsevier's contract with Dr. Wright has expired, and Elsevier is presently considering their replacements, none of whom are UCF faculty members. Once the Journal's new editor-in-chief is selected, it will no longer be housed at UCF.

UCF is not a party to Elsevier's contract with Dr. Wright, did not review or approve the contracts, and receives no remuneration thereunder. Furthermore, UCF plays no role in the SSR Journal's operations, topics, article selections, peer review process, copy-editing, compiling, production, publication, advertising, subscription pricing, sales or webpage, which is maintained and controlled by Elsevier, via servers located in Dayton, Ohio.

While initially not a party to this action, Elsevier filed an "Emergency Motion of Elsevier, Inc. for Leave to Intervene, and for a Stay of Proceedings" on November 13, 2013. This Court granted that motion on March 12, 2014 and allowed Elsevier to join the litigation. On March 21, 2014, Elsevier filed "Intervenor Elsevier, Inc.'s Answer, Affirmative Defenses, and Counterclaims to Petition of John M. Becker for Writ of Mandamus."

The previous trial court rendered a November 7, 2013 "Order on Respondent's Amended Emergency Motion to Compel to Compel [sic] Return of Inadvertently Disclosed Documents," which granted Becker relief without holding a hearing and only conducted an in camera review of some of the records in question. UCF filed "UCF's Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013." The previous court granted the stay, but denied all other relief on November 13, 2013. Following the entry of that order, UCF filed a writ of certiorari to the Fifth District Court of Appeal. The previous trial judge recused himself from this case on November 15, 2013, at which point the

case was assigned to the undersigned. On March 3, 2014, the Fifth District Court of Appeal issued a mandate stating that it could not determine if the November 13, 2013 order was a final order and relinquished jurisdiction to this Court to determine if the order in question was a final order, as well as to conduct further proceedings. UCF filed "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF" on March 10, 2014.

This Court held an evidentiary hearing April 9-11, 2014, wherein the Court heard testimony and admitted evidence regarding whether the records that Becker seeks are public record. At that hearing, the following witnesses testified: Dr. Wright; Ann Corney, an executive publisher at Elsevier; Dean Michael Johnson,[3] dean of UCF's College of Science; Becker; Professor Jana Jasinski, department chair of the sociology department; John M. Becker, and Dr. Amy Donley, a UCF professor who assisted Dr. Wright in his work on the SSR Journal.[4] This Order follows that hearing.

FINALITY OF THE PREVIOUS COURT'S PREVIOUS ORDER

In its mandate, the Fifth District indicated that it could not determine whether the trial court's November 13, 2013 "Order on 'UCF Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013" was a final order. A final order is one that "constitutes the end to judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected." *State Farm Mut. Auto. Ins. Co. v. Open MRI of Orlando, Inc.*, 780 So. 2d 339 (Fla. 5th DCA 2001) (citing *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97 (Fla. 1974)). The test to determine whether an order is a final order "is whether the decree disposes of the

[3] The Court makes a finding that Dean Johnson's testimony was particularly credible. He was a thoughtful and well-spoken witness with a great deal of experience in higher education and the outside activities of professors.
[4] The specific testimonies of these witnesses are discussed *infra*.

cause on its merits leaving no questions open for judicial determination except for execution and enforcement of the decree if necessary." *Welch v. Resolution Trust Corp.*, 590 So. 2d 1098 (Fla. 5th DCA 1991).

Here, UCF filed a motion requesting a stay of the court's previous order, rendered on November 7, 2013; UCF also requested that the court conduct an evidentiary hearing, decline Becker's ex parte request for rendition of a final judgment, and grant a thirty-day enlargement of time. In the previous court's November 13, 2013 Order, the court granted a stay through November 14, 2013 and denied all other relief; however, when the court granted the stay, it did not indicate what would happen following the stay. As a result, this Court determines that the previous court's November 13, 2013 Order was a non-final order.

JURISDICTION OF THIS COURT TO RECONSIDER THE PREVIOUS COURT'S ORDER

On November 7, 2013, the previous court entered an "Order on Respondent's Amended Emergency Motion to Compel to Compel [sic] Return of Inadvertently Disclosed Documents." In that Order, the Court, without hearing, determined that almost all of the records that UCF sought to be returned were public records. On November 15, 2013, the previous judge recused himself, and this case was reassigned to the undersigned judge. The Fifth District Court of Appeal accepted UCF's petition on November 15, 2013, and it then relinquished jurisdiction back to the trial court on March 3, 2014. On March 10, 2014, UCF filed "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF." In that Motion, UCF requests that this Court vacate the previous court's November 7 and 13, 2013 Orders, apply the *Schwab* factors to the facts of the case, and hold an evidentiary hearing.

Florida Rule of Judicial Administration 2.330(h) states:

> Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for delay in moving for reconsideration or other grounds for reconsideration exist.

Although an order entered by a judge who is later disqualified is subject to reconsideration by a successor judge, a party is not entitled to have the order vacated as a matter of right. *Schlesinger v. Chem. Bank*, 707 So. 2d 868, 869 (Fla. 4th DCA 1998); *see also Doe ex rel. Doe v. Publix Supermarkets*, 814 So. 2d 1249, 1251 (Fla. 2d DCA 2002) ("Orders entered by a disqualified judge are voidable not void.").

Here, UCF immediately filed its petition to the district court following the previous trial court's denial of relief for UCF, thus divesting this Court of jurisdiction. When the District Court relinquished jurisdiction on March 3, 2014, UCF filed its motion for reconsideration seven days later. This Court finds that UCF has shown good cause for not filing its motion for reconsideration within 20 days of the previous judge's recusal and accepts UCF's motion for reconsideration as timely. *See Buckner v. Cowling*, 2014 WL 337417 at *1 (Fla. 5th DCA Jan. 31, 2014).

ANALYSIS OF THE PUBLIC RECORDS REQUEST

Turning to the underlying issue of whether the records that petitioner seeks are public, the Court must first address the preliminary issue of which party bears the burden of proof, an issue that is in dispute. When the respondent denies that the records being sought are public records subject to disclosure, "the burden rests initially with the [petitioner] to prove that what [the petitioner] seeks meets the definition of a public record." *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002). Accordingly, the Court finds that Becker bears the burden of proof.

Under Chapter 119, the term public records means "all documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by an agency." § 119.011(12), Fla. Stat. (2013). When determining whether records are private records or public records that are subject to disclosure under Chapter 119, the seminal case of *News and Sun-Sentinel v. Schwab*, 596 So. 2d 1029 (Fla. 1992), determines that it is necessary to conduct a totality of the factors test:

> The[se] factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.

Id. at 1031. Furthermore, in addition to *Schwab*'s nine factors, both the Florida Supreme Court and the Fifth District Court of Appeal have considered public policy as another relevant factor under *Schwab*. *See Mem'l Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 380 (Fla. 1999) (determining that "[a]s a matter of public policy, [the Court found] that public records access applies under the circumstances of this case"); *Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (noting that "[w]ere [the court] to hold that the Salvation Army is not acting on behalf of Marion County, this public policy would be circumvented"). Finally, "private documents cannot be deemed public records solely by their virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003). In order to

determine if the records Becker seeks are public records, the Court must apply the totality of the factors test.

1) The level of public funding. While this is not an important factor under the analysis pursuant to *Schwab*, the testimony taken at the evidentiary hearing makes clear that UCF does not provide substantial funds, capital, or credit to the SSR Journal. Dr. Wright testified that because his editorship of the SSR Journal constitutes a professional service, which his collective bargaining agreement with UCF allows, he uses some university resources to conduct this work, which includes a UCF email address, the use of student assistants paid for by UCF, phone lines, internet access, and the like. He also indicated that his graduate assistant has a desk in a shared office space with a phone line, but that she mainly conducted her work for the Journal on her personal laptop. Furthermore, Dean Johnson indicated that professors may use university resources for outside endeavors, but they must get prior approval, which Dr. Wright had done at some point in time. It was also apparent that Dr. Wright was free to assign the student assistant to assist with any task or project upon which Dr. Wright was working, not just the SSR journal.

Based on the testimony taken at the evidentiary hearing, it appears that public funding by UCF of the SSR Journal, if any, was slight. *Cf. Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So. 2d 730, 734 (Fla. 2d DCA 1991) (finding the records sought were public when the government entity provided a substantial share of the capitalization of a corporation); *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418, 421 (Fla. 5th DCA 1997) (determining records to be public subject to disclosure when there was a substantial public investment and funding).

2) Commingling funds. Based on the testimony provided at the evidentiary hearing, it does not appear as though the SSR Journal commingled funds with UCF. Dr. Wright testified

that while he was paid for his editorial services in connection with the journal, UCF was not involved with those payments. In fact, he noted that the SSR Journal bank account bore his name and also indicated that he was acting as editor-in-chief of the Journal, which he did to avoid university bureaucracy. The checks that Dr. Wright received in relation to the Journal were payable to Dr. Wright himself or the Journal, not UCF. Dr. Wright did admit that he used money intended for the Journal to fund projects that were not the business of the Journal, but he also indicated that Elsevier did not reimburse UCF for any of the materials used in connection with the running of the journal. Ultimately, Dr. Wright concluded that it was not UCF's business what goes on with that account, as he indicated that it was a private account. Ms. Corney indicated that the payments from Elsevier to Dr. Wright allowed him to choose what account in which he wanted the monies deposited; furthermore, the payments made to Dr. Wright were for services rendered. Ms. Corney stated that it was Elsevier's position that Elsevier did not care what Dr. Wright did with the money. Ms. Corney also testified that Elsevier has never made any payments to UCF, and UCF has never made any payments to Elsevier. Finally, Dean Johnson testified that the SSR Journal shared no joint bank accounts with UCF.

Based upon the aforementioned testimonies, the Court finds that commingling of funds, if any, between UCF and the SSR Journal was nominal.

3) Whether the activity was conducted on publically owned property. While some of the activity of the journal was conducted on UCF's public property, it appears as though the majority of the activity took place off of UCF's campus. Ms. Corney testified that the Journal is compiled, copy-edited, and produced in Chennai, India, and Elsevier, whose headquarters are in the Netherlands, has control over its print and online distribution.

As to the activities that were conducted on UCF's campus, Dr. Wright testified that the editing of the journal really takes place in cyberspace, as the activities can be done anywhere; he elaborated that he spent about 10% of his time during business hours at UCF performing professional service, which included work on the Journal, among other endeavors. As noted above, this was allowed pursuant to his collective bargaining agreement. Dr. Wright also testified that he worked on the Journal at home, as well as after hours. He further noted that his graduate assistant also helped with the running of the Journal, primarily in the form of clerical matters,[5] and while she did have her own desk in an editorial office at UCF, she primarily conducted the work from her private laptop.

From the testimony taken at the hearing, the Court finds that substantial activities of the SSR Journal were not conducted at UCF. *Contra. News-Journal Corp.*, 729 So. 2d at 421 (finding that "[t]h activity [was] conducted on public property that has been leased to the Lessee to continue the operation of what had been a publicly operated hospital (internal quotations omitted)); *Fox v. News-Press Pub. Co., Inc.*, 545 So. 2d 941, 941 (Fla. 2d DCA 1999) (holding that the assignee of the contract was clearly performing a government function on public streets and property).

4) Whether services contracted for are an integral part of the public agency's chosen decision-making process. The testimony taken at the hearing demonstrates that UCF has no contract with Elsevier and no obligation to provide any money or resources for the SSR Journal's benefit. Dr. Wright testified that UCF has no power over Elsevier, and that if Elsevier were to stop publishing the Journal, then UCF could not then decide to continue publishing the Journal. He further indicated that UCF was not involved in deciding what articles to publish, selecting

[5] It is important to make the distinction that Dr. Wright adamantly testified that his assistant had a very limited role in the Journal—she made no editorial decisions, did not solicit or choose articles for publication, and had duties that were limited to clerical assignments.

peer reviewers, the operations of the Journal, or determining the content of the SSR Journal. Dean Johnson testified that the SSR Journal is not a department of the college, UCF has no ownership interest, and UCF has no choice in selection of articles or peer reviewers. Dean Johnson also indicated that Dr. Wright's continued service to the Journal had no impact on his employment or tenure at UCF. Finally, he stated that the SSR Journal performs no public function on behalf of UCF.

Based on this testimony, the services that Elsevier contracted with Dr. Wright for were not an integral part of UCF's chosen decision-making process. *See Schwab*, 596 So. 2d at 1032 (concluding that the records sought were not public in part because there was no delegation of decision-making authority by the government agency).

5) Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform. Here, the testimony from the evidentiary hearing shows that UCF has not contracted with Elsevier for any public services, the publication of the SSR Journal is not an integral part of UCF's decision-making process, and there is no delegation of, or participation in, any aspect of UCF's decision-making process by Elsevier. Dr. Wright specifically testified that Elsevier is not providing any governmental function that UCF would otherwise provide, and UCF has not delegated any of its obligations to Elsevier. He further stated that UCF has no power over Elsevier, and Elsevier is not an agent of UCF. Ms. Corney indicated that when Elsevier owns a journal, such as the SSR Journal, it has exclusive copyright and answers to no one on what to publish. Furthermore, Dean Johnson stated that there are very strict signatory rules about what may bind the university, and the SSR Journal is an outside activity that would not bind UCF.

Based on this testimony, the services for which Elsevier contracted with Dr. Wright were not a governmental function or a function that UCF would otherwise perform, as publishing a privately owned journal is not of the type that is typically considered a government function. *Compare Schwab*, 596 So. 2d at 1032 (finding that with "[t]he services contracted for . . . were not an integral part of the [agency's] decision-making process[, and t]here was no delegation of or participation in any aspect of the [agency's] decision-making process," and ultimately concluding that the records sought were not public) *with News-Journal Corp.*, 695 So. 2d at 421 (determining that the records at issue were public and subject to disclosure when the court found that the agency's "sole reason for existence [was] to see that its constituents have access to public . . . services").

6) The extent of the public agency's involvement with, regulation of, or control over the private entity. The evidence and testimony taken at the evidentiary hearing tended to show that UCF had no contract with Elsevier, and UCF had no obligation to provide any money or resources for the SSR Journal's benefit. Dr. Wright testified at the evidentiary hearing that UCF played no role in the Journal's operations, article selections, peer review processes, copy-editing, production, and publication. He also indicated that UCF had no authority to terminate or dissolve the SSR Journal, and that when another editor was selected for the Journal, UCF had no control over forcing the Journal to continue to be housed at UCF. Dr. Wright also indicated that his work on the Journal was confidential, and he ensured that his graduate assistant also understood that the work that she performed for the Journal was confidential.[6] Furthermore, Ms. Corney testified

[6] Dr. Wright's editor-in-chief agreement with Elsevier was entered into evidence at the hearing as UCF Exhibit 1. Section 8.7 of the agreement discusses the confidential nature of Dr. Wright's duties as editor-in-chief:

> 8.7 The Editor shall maintain all of the Confidential Information (as defined herein) in strict confidence, will not disclose any Confidential Information to any third party other than as necessary to perform the obligations set forth in this Agreement, and will protect such information with the highest

that when Elsevier owns a journal, such as the case here with the SSR Journal, it has exclusive copyright, and it does not have to ask permission to publish anything; in short, Elsevier answers to no one when it owns a journal.

Based on this testimony, the Court finds that UCF has no involvement with the regulation of, or control over, Elsevier and the SSR Journal. *See Schwab*, 596 So. 2d at 1032 (finding that the government agency "does not regulate or otherwise control [the private entity's] professional activity or judgment," and ultimately determining that the records at issue were not public); *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 281 (Fla. 4th DCA 2011) (holding that the records at issue were not public when the court found that the city played no role in any major decision-making process for the private entity); *contra News-Journal Corp.*, 695 So. 2d at 422 (finding the records at issue to be public when the government agency exercised real control over the private corporation's performance standards and requirements of a lease).

7) Whether the private entity was created by the public agency. UCF did not play any role in the creation of the SSR Journal. At the evidentiary hearing, Dr. Wright testified that the SSR Journal was created by Elsevier, a private, for-profit entity. He also noted that when the journal was initiall y created, it was housed at Johns Hopkins University.[7] Dr. Wright also indicated that any of his work product related to the journal is the property of Elsevier, and not

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> degree of care. For the purposes of this Agreement, "*Confidential Information*" means any business financial, operational, customer, vendor and other information disclosed by the Publisher to the Editor and not generally known by or disclosed to the public or known to the Editor solely by reason of the negotiation or performance of this Agreement, and shall include, without limitation, the terms of this agreement, subscription figures and market positioning data.

Dr. Wright testified that he interpreted this agreement to mean that he could share confidential information with his graduate assistant and Dr. Donley, provided that they both understood that the information they had access to in connection with the Journal was confidential.

[7] As mentioned in fn. 2, *supra*, Dr. Wright testified that the journal is housed wherever the editor-in-chief of the journal is employed. Ms. Corney elaborated on this point by stating that if information was discoverable simply because of where the editor-in-chief of the Journal sits, then she would seriously reconsider giving the position to any professor in the United States.

his own or UCF's. Specifically, in the editor-in-chief agreement that Dr. Wright entered into with Elsevier it clearly states that any and all work product made in relation to the Journal is the copyright and property of Elsevier.[8] Ms. Corney elaborated in stating that Elsevier owns the work product of the SSR Journal, including emails. Dean Johnson stated that the SSR Journal is not a department of the college, and UCF has no ownership interest in the Journal.

Based on the testimony presented at the evidentiary hearing, the Court determines that the SSR Journal was not publically created. *See Schwab*, 596 So. 2d at 1032 (finding that the public, government agency played no part in the creation of a private entity, and therefore the records that were created by the private entity were not public records subject to disclosure).

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[8] The relevant portion of the editor-in-chief agreement, mentioned previously in fn. 6, *supra*, can be found under Article 6 Ownership/Copyright and is reproduced in its entirety below:

> 6.1 As between the Editor and the Publisher, copyright and all other rights, including all electronic rights, in and to the layout, arrangement and contents of the Journal and the trademarks associated with the Journal vest in the Publisher. The Editor acknowledges the Publisher's ownership of the Journal, including without limitation the business records, work in process, inventory, trademarks and copyright in the material contained therein and agree that it shall not claim any rights in respect thereof.
>
> 6.2 All work produced by the Editor in relation to the Journal and/or for the Publisher pursuant to this Agreement, including without limitation to the selection, compilation and/or editing of the material published in the Journal, shall be work-made-for-hire of which the Publisher is the Author-at-law, and accordingly all rights comprised in the copyright in such work shall belong entirely to the Publisher. To the extent that any such work is determined not to be work-made-for-hire, the Editor also hereby assigns and transfers to the Publisher, to the maximum extent possible, all such right, title and interest as he/she may have in and to any of such work, the Journal and to any other material produced by the Editor for the Publisher pursuant to this Agreement.
>
> 6.3 The Editor authorizes use of his/her name, biography, image, and professional affiliations (at the Publisher's discretion) for purposes of promoting the Journal.
>
> 6.4 All editorial materials received by the Editor in his/her capacity as Editor of the Journal during the term of this Agreement, is intended for and is the property of the Publisher, and if requested by the Publisher, shall be immediately forwarded by the Editor to the Publisher, whether or not such material has been previously reviewed by the Editor.

8) Whether the public agency has a substantial financial interest in the private entity. The testimony taken at the hearing demonstrates that UCF has no ownership or financial interest in Elsevier or the SSR Journal. Dr. Wright testified that he had a bank account that was in his own name, as editor-in-chief of the SSR Journal, where he deposited monies from Elsevier. He indicated that he did not tell UCF about the account because it was not UCF's business. Dr. Wright also noted that UCF derives no income from the Journal—the Journal may not be purchased from UCF's website. Ms. Corney elaborated when she testified that Elsevier has never made any payments to UCF, and there is no contract between Elsevier and UCF for social science research. Dean Johnson indicated that the Journal is not a product of UCF, and UCF has no ownership interest in the Journal.

As a result, the Court determines that UCF does not have a substantial financial interest in Elsevier or the SSR Journal. *Contra News-Journal Corp.*, 695 So. 2d at 421 (determining that because the government agency had contributed a high level of public funding and had a substantial financial interest in the venture, the records sought were public and subject to disclosure); *Sarasota Herald-Tribune*, 582 So. 2d at 734 (finding that because the government agency had a substantial financial interest in the private entity, this tended to show that the records sought were public and subject to disclosure).

9) For whose benefit the private entity is functioning. The testimony at the evidentiary hearing showed that Elsevier publishes the SSR Journal for its own financial benefit, and UCF receives no remuneration for the SSR Journal. Dr. Wright testified at the hearing that the contract between himself and Elsevier does not involve UCF in any way. He also elaborated that Elsevier is a private, for-profit entity. Ms. Corney echoed that Elsevier is a privately owned, for-profit entity in the business of academic publishing. As to whether UCF receives some intangible

benefit as a byproduct of housing the Journal, Dean Johnson also testified that while there is some prestige associated with serving as editor-in-chief of an academic journal, that prestige is slight. Dr. Jasinski also indicated that there is minimal prestige in housing an academic journal.

The Court finds that based on this testimony, the SSR Journal does not serve as a public primary beneficiary. *See Schwab*, 596 So. 2d at 1032 (determining that while the government agency received a benefit from its contract with the private entity, the private entity's motivation was to receive compensation, and not to provide a public service, and ultimately determining that the records sought were not public).

10) Public Policy. This case involves great public policy concerns for not only UCF, but also all other public universities. Importantly, as Elsevier has noted in its materials, and as Ms. Corney testified at the evidentiary hearing, if this Court were to determine that the records sought were public and subject to disclosure, then Elsevier would seriously reconsider giving the editor position to any professor housed at a university in the United States. Furthermore, Dr. Wright, Ms. Corney, and Dean Johnson all testified to the importance of the anonymity aspect of peer reviewing articles, and how crucial peer reviewing is to the academic publishing process; to find that these records are public would contravene those endeavors.[9] The Court finds that a finding that the records sought are public records subject to disclosure would in fact disregard established public policy.

While no factor should be weighed more heavily than another, an examination of these factors reveals that the records Becker seeks are not public records, as the totality of the factors

[9] The Court also points out that the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995), which Florida has recently adopted, places emphasis on the importance of peer review. ("One means of showing [that scientific evidence is based on scientifically valid principles] is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication. . . . That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science.")

demonstrates that no public function has been transferred or delegated by UCF to Elsevier, and UCF did not create the SSR Journal, does not regulate or control its options, and has no substantial financial interest in it.[10]

ANALYSIS OF ELSEVIER'S TRADE SECRET AND COPYRIGHT CLAIMS

Elsevier, the intervener, joins UCF in its claims that the records sought are private and not subject to disclosure, and adds its own, original claims that the records sought contain trade secrets, as well as are the copyright of Elsevier. The records request was directed to the public university, UCF, not the private company, Elsevier. Because the Court finds that the records that Becker seeks are private, the Court need not address these trade secret and copyright claims.

ATTORNEY'S FEES

Becker is entitled to a fee award only if the Court "determines that [UCF] unlawfully refused to permit a public record to be inspected or copied." § 119.12, Fla. Stat. (2013). The Court finds that UCF has not "unlawfully refused" Becker's inspection and copying of the SSR Journal related e-mails as those e-mails are not public records open to public inspection under Chapter 119. Alternatively, the Court finds that UCF has demonstrated a good faith and reasonable belief in its position, thus also warranting the denial of attorney's fees to Becker. *See*

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[10] It is worth mentioning that in Becker's closing argument, he relied on *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009) and *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227 (Fla. 3d DCA 1998). In *National Collegiate Athletic Ass'n*, the court found that the records sought were public records subject to disclosure, and noted that the public records law should be liberally construed in favor of an open government, and if there is in any doubt in favor of disclosure, that doubt should be in favor of disclosing the records. 18 So. 3d at 1206. Here, the Court finds that it has liberally construed the public records law, and it still determines that the records sought are not public subject to disclosure, as Becker fails to meet any of the *Schwab* factors.

In *Booksmart Enterprises*, the court determined the records sought were public where a privately owned on-campus bookstore kept course book list forms that had been completed by instructors. 718 So. 2d at 229. The court determined that the private bookstore then became a custodian of those public records and thus could not deny anyone access to the forms. *Id.* Here, the Court again determines that simply because a professor employed by a public agency has kept separate records for a private entity does not render those records public; this again is evidenced by Becker's failure to meet any of the *Schwab* factors. Accordingly, the Court is not persuaded by Becker's reliance on these cases.

Stanfield, 695 So. 2d at 503; *Harold v. Orange County, Fla.*, 668 So. 2d 1010, 1012 (Fla. 5th DCA 1996).

The other component of Becker's fee request relates to the non-SSR Journal related e-mails produced by UCF after the filing of this lawsuit. UCF's pre-suit communications to Becker put him on notice that UCF understood the scope of his request was limited to SSR Journal related e-mails. In response, Becker never objected to or corrected UCF's understanding and his mandamus petition and post-filing press release are both consistent with UCF's initial understanding. Once this scope issue was called to UCF's attention by Becker's court filings, UCF promptly gathered and produced to Becker more than 15,000 e-mails.

Under these circumstances, the Court finds that UCF did not "unjustifiably delay" in producing the non-SSR Journal related e-mails, and therefore Becker's requested fee award in relation to those e-mails is also due to be denied. *See Office of State Attorney v. Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. Becker's "Emergency Petition for Writ of Mandamus For Violations of the Public Records Act" is **DENIED**.
2. "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF" is **GRANTED**.
3. The records that UCF inadvertently turned over to Becker are private records that **are not** subject to disclosure under Chapter 119.

4. Becker **is not** entitled to an award of attorney's fees in this matter.

5. This is intended to be a Final Order that disposes of all issues.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 17 day of April, 2014.

JOHN MARSHALL KEST
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via electronic filing and/or U.S. Mail on this 17 day of April, 2014, to the following: **ANDREA FLYNN MOGENSEN, ESQ.**, The Law Office of Andrea Flynn Mogensen, P.A., 200 South Washington Blvd., Suite 7, Sarasota, Florida 34236; **VICTOR LEE CHAPMAN, ESQ.**, Barrett, Chapman & Ruta, P.A., 18 Wall Street, Orlando, Florida 32801; **RICHARD E. MITCHELL, ESQ.**, GrayRobinson, P.A., 301 E. Pine Street, Suite 1400, Orlando, Florida 32801; **WILLIAM S. STRONG, ESQ.**, Kotin, Crabtree & Strong, LLP, One Bowdoin Square, Boston, Massachusetts, 02114; and **AVA K. DOPPELT, ESQ.**, Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., 255 South Orange Avenue, Suite 1401, Orlando, Florida 32801

Diane Lacore
Judicial Assistant

181 So.3d 504 (Table)
Unpublished Disposition
District Court of Appeal of Florida,
Fifth District.

John M. BECKER, Appellant,
v.
UNIVERSITY OF CENTRAL FLORIDA, ETC., Appellee.

No. 5D14–1732.
|
Dec. 8, 2015.

Appeal from the Circuit Court for Orange County, John M. Kest, Judge.

Attorneys and Law Firms

Andrea Flynn Mogensen, of Law Office of Andrea Flynn Mogensen, P.A., for Appellant.

Charles T. Wells, Thomas J. Wilkes, Richard E. Mitchell, and Jason A. Zimmerman, of GrayRobinson, P.A., Orlando, and Jeffrey T. Kuntz, of GrayRobinson, P.A., Fort Lauderdale, for Appellee.

Ava K. Doppelt, of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., Orlando, and William S. Strong, pro hac vice, of Kotin Crabtree & Strong, LLP, Boston, MA, for Intervenor Appellee, Elsevier, Inc.

Opinion

PER CURIAM.

***1** AFFIRMED.

ORFINGER, COHEN and EDWARDS, JJ., concur.

All Citations

181 So.3d 504 (Table), 2015 WL 8570796